BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HANG NGUYEN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,026,197
SHARPLINE CONVERTING, INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the September 30, 2008, Award of Administrative Law Judge Thomas Klein (ALJ). Claimant was granted an award for an 86 percent whole body disability, based in part on the injuries to her left hand, and in part for the psychological disability resulting from the significant trauma to her hand.

Claimant appeared by her attorney, Joseph Seiwert of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Michael D. Streit of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on December 19, 2008.

ISSUE

What is the nature and extent of claimant's injuries and disability? Claimant argues that she is permanently and totally disabled from any employment as the result of the crushing and burning injuries she suffered to her left hand on October 28, 2005, while working for respondent, along with the resulting psychological trauma. Claimant argues she is unable to return to any type of work. Respondent argues that claimant's psychological injuries are not as severe as claimant pretends and that claimant is able to return to the open labor market and perform work. Therefore, claimant should be

limited to a functional impairment to her left hand only, with no award for any alleged psychological impairment.

FINDINGS OF FACT

Claimant was working for respondent on October 28, 2005, when her left hand became caught in a press machine. The injury not only crushed claimant's hand, but, since the machine operated at a very high temperature, claimant suffered significant burns as well. Claimant suffered broken bones in her hand and underwent skin grafts to repair the burns. Claimant underwent at least two different operations on her hand.

After being treated, claimant returned to work for respondent, but had significant difficulties performing the work. Claimant was afraid of loud noises and could not work near machinery. Respondent accommodated claimant by moving her as far from the machines as possible, but claimant was still bothered by the noise and the machines. Claimant began having headaches and was having significant difficulties sleeping at night. During the first year after the accident, claimant was only able to sleep about three hours per night. Claimant also began having nightmares about the accident, which would wake her up.

Claimant was referred to board certified plastic surgeon Kenton Schoonover, M.D., for treatment of the hand. Claimant underwent reconstructive surgeries on October 28, 2005, and October 31, 2005. The resulting disability of 45 percent to the hand was based on the fourth edition of the AMA *Guides.*[1] Dr. Schoonover felt that claimant was capable of performing one-handed work, and could, possibly, do very limited work with her left hand. The impairment to claimant's hand was based on reduced range of motion. Dr. Schoonover did not measure claimant's grip strength. He felt her range of motion would be her most limiting factor. Claimant is able to move her left thumb, but has practically no movement of her fingers. Claimant cannot make a fist. Dr. Schoonover released claimant to return to one-handed limited duty in February 2006, but did not assess claimant's functional impairment until November 27, 2006.

Claimant was referred by her attorney to clinical psychologist Robert Schulman, Ph.D., on May 4, 2006. Claimant reported no prior psychiatric or psychological treatment. While claimant could speak a little English, she was limited and did not understand it very well. Claimant could read and write in Vietnamese. Dr. Schulman tried to administer the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) with the aid of an interpreter, but claimant was having difficulties understanding the questions. He opined that it is very difficult to use a standardized test with non-English speaking people. He also

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

could not tell whether the interpreter or claimant was actually taking the test. Dr. Schulman diagnosed claimant with a major depressive disorder from a single episode and resulting anxiety disorder from the hand injury. Because of her hand symptoms and impairment, claimant was constantly being reminded of the accident. The diagnosis of PTSD involves a finding that a person is put into a situation where they become fearful of possible death. He was unable to diagnose claimant with post traumatic stress disorder (PTSD) as he could not make up his mind whether claimant had suffered a "life-threatening" experience. He did note that pain could be a factor in determining whether an incident was traumatic enough to form the basis of a PTSD diagnosis. He agreed that claimant would be unable to return to work around similar machinery, and noted that she was hesitant, fearful, hypervigilant and anxious. Dr. Schulman did not find that claimant was permanently and totally disabled. He felt that claimant could work in the proper environment. He did not find that claimant was a malingerer. Claimant's fear of returning to her former work environment was understandable.

Claimant was referred by the ALJ to board certified psychiatrist and neurologist Elsie Steelberg, M.D., for an evaluation on September 21, 2006, and later for treatment. Claimant was diagnosed with severe major depression from a single episode, probable PTSD, and possible flashbacks. At this time, claimant continued to work for respondent, but Dr. Steelberg was amazed that claimant could do so. She determined that claimant was at maximum medical improvement (MMI) for her physical injury, but not for her psychiatric condition, and that claimant would need ongoing care. She opined that claimant would suffer from the effects of the hand injury whenever she looked at her hand.

Claimant remained under the care of Dr. Steelberg and, by August 22, 2007, was found to be at MMI medically but not MMI on a psychiatric basis. However, claimant was no longer working for respondent and was found to be unable to return to work in any capacity. Claimant was not only determined to be unable to work, but was also found to be unable to care for her family. Claimant was rated at 80 percent to the whole body pursuant to the fourth edition of the AMA *Guides*[2] for mental and behavioral disorders and due to her constant pain. Dr. Steelberg was provided a report from board certified psychotherapist Theodore A. Moeller, Ph.D. In that report, which will be discussed in more detail below, Dr. Moeller found claimant to be malingering. Dr. Steelberg was appalled that Dr. Moeller would find that claimant was malingering. Dr. Steelberg expressed concern with the diagnosis of Dr. Moeller, and referred claimant to Darwin Dorr, Ph.D., the Director of Clinical Training and Doctoral Training at Wichita State University. Dr. Steelberg acknowledged that she was not a psychologist, and often referred patients to Dr. Dorr for psychological testing. Dr. Steelberg testified that claimant was able to understand the questions presented to her by Dr. Steelberg, but that claimant had difficulty understanding Dr. Moeller's questions. The reason for this is not explained, as both Dr. Steelberg and

[2] AMA *Guides* (4th ed.).

Dr. Moeller utilized interpreters during their evaluations and questioning of claimant. Dr. Steelberg ultimately determined that claimant suffered from PTSD. In reaching this diagnosis, she read from DSM-IV quoting: "If a person experienced, witnessed, or was confronted with an event that involved actual or threats of death or serious injury or a threat to the physical integrity of self or others." Dr. Steelberg testified that that certainly would describe her (claimant)".[3]

Claimant was referred by respondent to Dr. Moeller on November 12, 14, and 16, 2007. Dr. Moeller performed a multitude of tests on claimant as noted in his Psychological Evaluation of November 19, 2007.[4] As was the case with all examining and treating health care professionals dealing with claimant, Dr. Moeller utilized a translator while dealing with claimant. Dr. Moeller testified that when testing a patient, a psychologist must "establish the voracity [*sic*] of what's being claimed."[5] If that is not possible, then it is not possible to diagnose within any reasonable degree of probability. Dr. Moeller listed the criteria for diagnosing malingering from the DSM IV-TR as follows:

1. Medical/legal context of presentation and a referral by an attorney;

2. Marked discrepancy between the person's claimed stress or disability and the objective findings;

3. Lack of cooperation during the diagnostic evaluation and in complying with the prescribed treatment regimen;

4. The presence of an antisocial personality disorder".[6]

Dr. Moeller determined that claimant met criteria 2 and 3 from this list. First, claimant presented as knowing no English, but as Dr. Moeller got to know her he realized that claimant did understand English to some extent. At times, claimant would respond before the translator finished translating the question. When asked about evidence of a psychological impairment secondary to claimant's work-related injury, he stated that he could not provide a psychological impairment, as claimant was "overendorsing things". He stated that claimant fell under the Axis I diagnosis of malingering.[7] He did agree that

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[3] Steelberg Depo. at 30-31.

[4] Moeller Depo., Ex. 2.

[5] Moeller Depo. at 6-7.

[6] Moeller Depo. at 8.

[7] Moeller Depo. at 13.

removing a patient from the environment where she experienced the trauma was the best thing, at least until the PTSD resolves.

A significant dispute arose between Dr. Moeller and Dr. Dorr. Dr. Dorr was presented with Dr. Moeller's testing and conclusions and disagreed with Dr. Moeller's finding of malingering with regard to claimant. Dr. Dorr did not say that Dr. Moeller's tests were incorrect. He said that when using something compromised, such as an English test on a non-English speaking person, the norms are no longer dependable. A significant dispute arose between the experts as to whether the MMPI-II could be used on a Vietnamese person. Dr. Moeller felt that, with the right translator (he used two different ones, finding the first to be inadequate), the test could be effective. Dr. Dorr stated that there were no norms for a Vietnamese person taking these tests. As such, Dr. Moeller's results were compromised. Dr. Moeller countered, arguing that the MMPI-II had been used with Vietnamese patients before and had been translated into Vietnamese, although he acknowledged the Vietnamese translation was not yet available.

This dispute between these experts continued through both depositions. Dr. Moeller continued to find that claimant displayed signs of malingering, while Dr. Dorr disputed those findings and argued that from the findings in Dr. Moeller's tests, the diagnosis of malingering cannot be made. Dr. Moeller did agree that there were psychological consequences associated with claimant's injuries. He was just not able to determine to what extent.

Claimant was referred by her attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an evaluation on October 31, 2007. Claimant was diagnosed with no movement in the fingers of her left hand, reflex sympathetic dystrophy (RSD) in her left hand and probable carpal tunnel syndrome on the left. He assessed claimant a 63 percent functional impairment to the left hand and determined that claimant's left hand was "[p]retty much useless".[8] Dr. Murati found claimant unable to do 17 of 18 job tasks from the task list created by vocational expert Doug Lindahl. This results in a task loss of 94 percent. He found no indications of malingering or symptom magnification. Dr. Murati recommended that claimant do no work with her left hand. He also recommended that claimant work as tolerated and to use common sense.

Claimant was referred by respondent to vocational expert Steve Benjamin for an evaluation on May 27, 2008. Mr. Benjamin found, based on the opinions of Dr. Murati and Dr. Moeller, that claimant could return to work in the open labor market. His opinion was, in part, based on Dr. Moeller's opinion that claimant had no objective evidence of psychological impairment from her work-related injury. However, when considering the

[8] Murati Depo. at 13.

opinion of Dr. Steelberg, Mr. Benjamin found claimant unable to work in the open labor market. Claimant would be unemployable when considering the opinion of Dr. Steelberg.

Claimant was referred to vocational expert Doug Lindahl by her attorney. Mr. Lindahl examined claimant on October 26, 2007. Based on the medical and psychiatric and psychological records provided, Mr. Lindahl found claimant to be functioning on a one-armed basis. Considering claimant's education and training, and the fact that she has a 4th grade education from Vietnam and cannot speak English on a functional level, he found claimant to be unemployable for any light or sedentary jobs. He noted that these jobs usually require frequent to constant reaching, handling and fingering. They also usually require a command of English. Mr. Lindahl was unable to identify any jobs that claimant could compete for.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[9]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[10]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[11]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

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[9] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[10] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[11] K.S.A. 2005 Supp. 44-501(a).

> injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[12]

It is uncontradicted that claimant suffered a significant trauma to her left hand while working for respondent.

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[13]

Respondent does not dispute that claimant suffered an injury to her hand and wrist and is entitled to a functional impairment for those injuries. Respondent argues that the treating physician, Dr. Schoonover, is the most credible in assessing claimant's functional impairment. The Board agrees and awards claimant a 45 percent impairment to her left hand. It is acknowledged that Dr. Murati awarded claimant a 63 percent impairment to the hand, but Dr. Murati found claimant to suffer from carpal tunnel syndrome and RSD, a diagnosis not made by any other health care professional. The opinion of the treating physician is found to be the most credible in this instance.

In addition to the functional impairment, claimant also alleges entitlement to an impairment for the psychological trauma resulting from the injury. Claimant has been evaluated by psychologists and psychiatrists, and has had her records reviewed and discussed by a psychology professor. Their opinions range from malingering to permanent total disability and an inability work in the open labor market.

As set forth in *Love*,[14] the following three elements must be met for a traumatic neurosis claim to be compensable:

1. A physical injury;

2. Symptoms of traumatic neurosis; and

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[12] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[13] K.S.A. 44-510e(a).

[14] *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, 771 P.2d 557 (1989).

3. These symptoms are directly traceable to the physical injury.[15]

The Kansas Supreme Court has long held that traumatic neurosis, as well as other psychiatric problems are compensable. "It is firmly established in this jurisdiction that traumatic neurosis, following physical injury and shown to be directly traceable to the injury, is compensable under the Workmen's Compensation Act." [16] However, the Court in *Berger* cautioned:[17]

> Even though this court has long held that traumatic neurosis is compensable; we are fully aware that great care should be exercised in granting an award for such injury owing to the nebulous characteristics of a neurosis. An employee who predicates a claim for temporary or permanent disability upon neurosis induced by trauma, either scheduled or otherwise, bears the burden of proving by a preponderance of the evidence that the neurosis exists and that it was caused by an accident arising out of and during the course of his employment.[18]

In *Love*, an employee with no previous history of mental problems apparently started to develop traumatic neurosis because of a job-related fall/injury. The claim on the neurosis was denied under *Ruse.*[19] At the time of the *Ruse* decision, there was a fourth element in the test for traumatic neurosis. There had to be a causal connection between the work the claimant performed and the neurosis. The *Love* court overruled *Ruse*, finding the reason for the requirement of a causal connection with the work performed no longer exists.

However, there still exists the requirement that mental illness, standing alone, is not compensable in Kansas. The Supreme Court in *Followill*[20] held "that the obligation of an employer under K.S.A. 44-501 *et seq.* does not extend to mental disorders or injuries unless the mental problems stem from an actual physical injury to the claimant."[21]

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[15] *Id.* at 398.

[16] *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998); citing *Jacobs v. Goodyear Tire & Rubber Co.*, 196 Kan. 613, 412 P.2d 986 (1966).

[17] *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 506 P.2d 1175 (1973).

[18] *Id.* at 550.

[19] *Ruse v. State*, 10 Kan. App. 2d 508, 708 P.2d 216 (1984).

[20] *Followill v. Emerson Electric Co.*, 234 Kan. 791, 674 P.2d 1050 (1984).

[21] *Id.* at 796.

Here, claimant has suffered a significant physical injury with symptoms of traumatic neurosis which can be directly traceable to that physical injury. The Board finds that claimant's traumatic neurosis and the resulting disability are compensable and claimant is entitled to a permanent disability for that injury.

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[22]

K.S.A. 44-510c(a)(2) states:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.[23]

Respondent contends claimant is capable of returning to work in the open labor market. Claimant argues that she is entitled to an award for a permanent total disability. Medical, vocational and psychiatric/psychological opinions support both positions. The Kansas Court of Appeals was asked to consider the issue of permanent total disability in *Wardlow*[24]. Wardlow was driving a forklift called a "high-low" when both he and the high-low went off a loading dock. Wardlow was seriously injured, suffering a fractured low back, pelvis, right hip and right femur, with a probable fracture of his right ankle. Wardlow had not worked nor sought work since the accident. However, medical and vocational testimony supported a finding that Wardlow was capable of part-time sedentary work. Wardlow's past work history included unskilled physical labor. The trial court found, based on his age, his lack of training, driving and transportation problems, being in constant pain and having to constantly change body position, that Wardlow was permanently and totally disabled, as Wardlow was realistically unemployable.

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[22] K.S.A. 44-510e.

[23] K.S.A. 44-510c(a)(2).

[24] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

Here, the injury suffered by claimant to her left hand was incredibly traumatic. Not only was claimant's hand crushed, but she also suffered significant burns from the press machine. At best, claimant is reduced to one-handed work. Her testimony, coupled with the opinions of Dr. Dorr, Dr. Steelberg and vocational experts Doug Lindahl and Steve Benjamin, convinces the Board that this claimant is not capable of obtaining employment in the open labor market. Claimant is realistically unemployable, and, thus, is entitled to an award for a permanent and total disability.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to find claimant is permanently and totally disabled.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas Klein dated September 30, 2008, should be, and is hereby, modified to find claimant to be permanently and totally disabled.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Hang Nguyen, and against the respondent, Sharpline Converting, Inc., and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury which occurred on October 28, 2005, and based upon an average weekly wage of $439.31.

Claimant is entitled to 61.43 weeks temporary total disability compensation at the rate of $292.89 per week or $17,992.23, followed by permanent total disability compensation at the rate of $292.89 per week not to exceed $125,000.00 for a permanent total general body disability.

As of February 27, 2009, there would be due and owing to the claimant 61.43 weeks of temporary total disability compensation at the rate of $292.89 per week in the sum of $17,992.23, plus 112.57 weeks of permanent total disability compensation at the rate of $292.89 per week in the sum of $32,970.63, for a total due and owing of $50,962.86, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $74,037.14 shall be paid at $292.89 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of March, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Michael D. Streit, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge